

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Z-Tel Communications, Inc.	:	
-vs-	:	
Illinois Bell Telephone Company,	:	02-0160
d/b/a Ameritech Illinois	:	
	:	
Verified Complaint and Request for	:	
Emergency Relief Pursuant to Sections	:	
13-514, 13-515 and 13-516 of the Illinois	:	
Public Utilities Act.	:	

ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER ON REHEARING

By the Commission:

I. Procedural History

On February 22, 2002, Z-Tel Communications, Inc. ("Z-Tel") filed with the Illinois Commerce Commission ("Commission") a verified Complaint against Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") pursuant to Section 13-514, 13-515, and 13-516 of the Illinois Public Utilities Act ("Act"). On May 8, 2002, the Commission entered an Order granting, in part, Z-Tel's Complaint.

On June 6, 2002, Ameritech filed an Application for Rehearing requesting rehearing on three issues in the Order. On June 19, 2002, the Commission granted Ameritech's Application for rehearing on two issues, penalty and parity. The parties agreed that the issue of the imposition of penalties was legal in nature and further evidence was not required. As for the parity issue, an evidentiary hearing was held pursuant to notice and the rules and regulations of the Commission on September 27, 2002. Ameritech presented the Direct and Rebuttal testimony of Beth Lawson, its Director of OSS Regulatory Support. Z-Tel provided the Direct testimony of Mike Reith, its Director of Industry Policy. Staff presented the Direct testimony of Nancy Weber, of the Commission Telecommunications Division. At the hearing on September 27, 2002, the record was marked "Heard and Taken."

The parties filed separate Initial and Reply Briefs for both the penalty and the parity issues. Ameritech filed a draft order on October 8, 2002.

II. Parity

A. Ameritech's Position

Ameritech asserts that the requirement to provide the Local Loss Report ("LLR"), contained in the Commission's Order of May 8, 2002, should be removed. Ameritech contends that the LLR is a much less reliable indicator of competitive line losses than the 836 Line Loss Notice ("LLN"). Further, Ameritech maintains that its retail business operations no longer use the LLR and will not use it in the future. Ameritech also notes that Staff witness Weber did not respond to Ameritech's testimony the LLR was not useful to nor used by the CLECs.

Moreover, Ameritech maintains that Z-Tel does not use the LLR and, indeed, Z-Tel complained that it was not integrated with the 836 LLN. Ameritech also notes that Z-Tel does not object to elimination of the LLR if the 836 LLN is modified. In response, Ameritech contends that the form and content of the 836 LLN was negotiated with the competitive local exchange carriers ("CLECs") during the collaborative process required by the Federal Communications Commission's ("FCC's") and the Commission's Merger Orders. Additionally, Ameritech contends that the 836 LLN should not be modified in this proceeding because it is consistent with Industry Guidelines developed by the Ordering and Billing Forum.

According to Ameritech, the Commission has no jurisdiction to consider Z-Tel's request to modify the 836 LLN. Ameritech contends that this request is beyond the request sought in the original Complaint. Also, Z-Tel did not file an application for rehearing and, therefore, Ameritech opines that it cannot now seek to modify the Commission's Order of May 8, 2002.

With respect to Z-Tel's request for adding four new categories of information to the 836 LLN, Ameritech contends that Z-Tel has not met its burden to prove why the 836 LLN should be changed. The first category requested, the Disconnect Reason Code ("DRC"), Ameritech contends, is carrier confidential information and is not used by Ameritech's retail operations. The second category, the Billing Telephone Number ("BTN"), Ameritech asserts would only feed back to Z-Tel the BTN that Z-Tel establishes and controls. The order number, Z-Tel's third request, Ameritech maintains was previously included in the 836 LLNs, but was the cause of one of the problems identified in the original Complaint and should, therefore, not be included again. Finally, Z-Tel requests that a contact name be included on the 836 LLN. Ameritech counters that Z-Tel already has a name and number to call and calls frequently.

In response to Z-Tel's requests enumerated above, Ameritech maintains that the information is already available to Z-Tel from other sources. According to Ameritech, Z-Tel already knows the name, address, telephone number, fax number and e-mail address of its contact person. Z-Tel also already knows the BTN through its own billing system. The BTN, the DRC and the order number, Ameritech asserts, are shown on the ASON service order that Z-Tel may view and copy using the Order Status Inquiry

function of the enhanced Verigate system which is access via the Web Toolbar. Ameritech asserts that Z-Tel also has the existing capability to access ASON service orders using its CORBA Application to Application interface. Using CORBA, Z-Tel could download any or all of the information from the service order, integrate it with Z-Tel's systems and store, format and the use the information in any manner it saw fit.

B. Z-Tel's Position

In the testimony of Z-Tel witness Reith, he stated that "Z-Tel does not oppose Ameritech's proposal to discontinue the Local Loss Report, so long as the same information, plus additional information that is currently provided to Ameritech's retail unit is provided to Z-Tel as part of the traditional 836 Line Loss Notice process." (Z-Tel Ex. 7.0 at 2). He requested that Ameritech provide the following information in a single report to Z-Tel: 1) the working telephone number of the disconnect; 2) the completion date of disconnect; 3) the reason for the disconnect or DRC; 4) the telephone number to which the account is billed; 5) the order number; and 6) the contact name of a person at Ameritech that Z-Tel should contact in the event of an error in the disconnect report.

In its Initial Brief on Rehearing, however, Z-Tel does not reassert this request and instead argues that the Commission's May 8, 2002 Order should not be amended. Z-Tel maintains that the LLR provides information that is useful to CLECs in managing their operations. Z-Tel argues that, contrary to Ameritech's assertion, the information in the LLR is not redundant to the information in the 836 LLN. Also, Z-Tel points to evidence that as of July 23, 2002, at least 25 CLECs retrieve the LLR via the website and at least 4 CLECs have requested to receive the LLR via e-mail.

Moreover, Z-Tel argues that although Ameritech's retail business units may no longer rely on the LLR, they are provided access to the information through the delivery of change records from ASON. Z-Tel states that the ASON system is the interface that Ameritech's retail service representatives use to create, edit, distribute and control service orders, which is then available both in ASON and in downstream systems. Further, the information in the ASON records for service orders is available, according to Z-Tel, to Ameritech's retail operations through a single, batch delivery of change records. On the other hand, if Z-Tel wishes to access the information in ASON it must do so on a case-by-case basis.

Lastly, in order to achieve parity, Z-Tel requests that Ameritech be required to develop application to application software systems that will allow Z-Tel to retrieve ASON-generated records (through Verigate) in the same single-process that Ameritech's retail operations do.

C. Staff's Position

Staff asserts that Ameritech retail's reliance on the LLN does not result in parity, because Ameritech does not rely on the LLN to discontinue billing and Z-Tel does. Staff contends that Ameritech has offered no evidence on rehearing to reach a different

conclusion. According to Staff, Ameritech cannot now claim that CLECs should not receive this information only because Ameritech's retail has stopped receiving it.

In response to Ameritech's position that the LLR is redundant to information that is otherwise available to CLECs, Staff maintains that this does not address the disparity in billing. Moreover, Staff avers that the LLN and LLR are not redundant and are intended to remedy the inferior information provided to Z-Tel.

Staff also disagrees with Ameritech that the Commission is limited in the remedy that can be imposed on rehearing. Staff contends that Commission is free to impose changes to the 836 LLN and to grant greater relief on rehearing than originally ordered.

As for the DRCs that Mr. Reith requests in his testimony, Staff points out that carrier confidentiality cannot be a concern because Ameritech provided evidence that CLECs may currently access this information via Verigate.

D. Ameritech's Reply

Ameritech, in its Reply Brief on Rehearing, asserts that Z-Tel distorts the record. Further, Ameritech argues that Z-Tel's request for an application to application software system is beyond the scope of the rehearing and to grant it would violate due process.

In response to Staff, Ameritech asserts that the record shows that Z-Tel does not find the LLR to be useful. Also, because Ameritech retail solely relies on LLN, the requirement to provide the LLR should be removed.

E. Commission Analysis and Conclusion

No evidence was presented on rehearing that convinces us to change our original order. Ameritech has failed to demonstrate that the requirement to provide the LLR to Z-Tel should be lifted. The disparity in billing that results from the automatic updating of customers' billing records in Ameritech's systems, addressed by Staff witness Weber, is of concern to the Commission. This is an issue that Ameritech attempts to avoid and, in fact, does not address at hearing or in either of its briefs on rehearing. Although Z-Tel may have access to the information contained in the LLR, and for this reason Ameritech contends the LLR is redundant, without Ameritech providing more than the 836 LLN to Z-Tel, the billing disparity issue remains unsolved.

We agree with Staff that the fact that Ameritech's retail organization is no longer using the LLR is not an adequate basis to eliminate the requirement for Ameritech to provide this information to Z-Tel.

On one point we do agree with Ameritech. A change of the 836 LLN should not be ordered without input from the CLEC community and, therefore, Z-Tel's request in the testimony of Mr. Reith is denied.

In its briefs, Z-Tel requests that the Commission order the necessary application-to-application software systems to make the ASON service order records available to CLECs in a way that will allow CLECs to retrieve ASON-generated service order records through Verigate. We conclude that the record is not adequately developed on this issue to permit us to make a determination on this request. Indeed, Staff indicates that it is not clear what Z-Tel is actually requesting.

Although Ameritech characterizes Z-Tel witness Reith's testimony as stating that the LLR is of no value and does not use it, based on our review the record, it is clear that Z-Tel actually was suggesting a compromise and, failing that, recommended that the Commission's original order not be amended.

Based on our review of the evidence offered on rehearing and the arguments contained in the parties' briefs, the Commission finds that there is no new evidence or legal basis to support a change to the Commission's original conclusion. Therefore, our original order of May 8, 2002 shall remain in full force and effect.

III. Penalties

At issue in this rehearing is whether Ameritech is subject to penalties pursuant to Section 13-305 for its violation of Section 13-801. If so, the amount of any penalties will be determined in a separate proceeding.

A. Ameritech's Position

Ameritech notes that a violation of Section 13-801 is listed as one of several per se violations of Section 13-514. See 220 ILCS 5/13-514(11). If a Section 13-801 violation is prosecuted under Section 13-514(11), the Commission can assess penalties under Section 13-516. Ameritech urges that the availability of these penalties precludes the Commission from imposing penalties under Section 13-305, even if a competitive local exchange carrier ("CLEC") proves a Section 13-801 violation without using Section 13-514 in its analysis.

Ameritech avers that Section 13-801 contains text that instructs the Commission to "determine any matters in dispute between the [ILEC and CLEC] pursuant to Section 13-515 of this Act." 220 ILCS 5/13-801(k). Ameritech also asserts that "[t]he legislature originally enacted Sections 13-514, 13-515, and 13-516 as 'a package deal'." (Ameritech Initial Brief on Rehearing at 3). Therefore, Ameritech maintains that Section 13-801 must be applied in connection with Sections 13-514, 13-515, and 13-516, which again suggests that the availability of a Section 13-516 penalty necessarily precludes those of Section 13-305.

Similarly, Ameritech urges that the phrase "in a case in which a civil penalty is not otherwise provided for in this Act" controls Section 13-305. Since penalties are "otherwise provided for" in Section 13-516, Ameritech maintains that Section 13-305 can not apply to Section 13-801 violations.

Moreover, Ameritech sets forth a detailed argument on how the notice requirement in Section 13-305 limits the penalties to which it can be exposed. Noting that Z-Tel and Staff argue that the notice requirement is outside the scope of rehearing, but would be appropriate in a penalty proceeding, Ameritech acknowledges that the issue could wait until a penalty proceeding but contends that the matter is already ripe.

Ameritech claims that, even if Section 13-305 penalties can be applied for violations of Section 13-801, such penalties can not be imposed on it prior to its receiving notice that it is in violation. See 220 ILCS 5/13-305(3). Ameritech posits that “only the Commission can make a determination of violation of the Act or an order, rule or regulation of the Commission,” so “notice” should be construed as notice delivered by the Illinois Commerce Commission.

Ameritech contends that the “first notice of violation of Section 13-801 from the Commission was its May 8, 2002 Final Order.” Ameritech disputes that the February 27, 2002 Order granting emergency relief to Z-Tel provides it with notice of a violation of the Act or a Commission order, claiming instead that it merely represented a finding “that Z-Tel has shown a likelihood of success on the merits of its complaint sufficient to warrant emergency relief.”

Finally, Ameritech lists a variety of mitigating factors which it asserts should foreclose any penalty, even if a Section 13-305 proceeding is otherwise warranted.

B. Z-Tel's Position

Z-Tel argues that, since statutory interpretation is necessary to determine if Section 13-305 applies, the relevant statutory language should be read for its ordinary meaning to best determine the intent of the legislature. Z-Tel asserts that Section 13-305 is clear, and therefore that the plain meaning of its text should be given effect. Z-Tel urges that the Section , in relevant part, be read as follows:

A telecommunications carrier ... that violates or fails to comply with any provisions of this Act [...] shall be subject to a civil penalty imposed in the manner provided in Section 13-304.

Every violation of the provisions of this Act ... is a separate and distinct offense. Penalties under this Section shall attach and begin to accrue from the day after written notice is delivered to such party or parties that they are in violation of or have failed to comply with this Act or an order, decision, rule, regulation, direction, or requirement of the Commission, or part or provision thereof. In case of a continuing violation, each day's continuance thereof shall be a separate and distinct offense. 220 ILCS 5/13-305.

Z-Tel maintains that Section 13-305 requires that this Commission pursue penalties in light of its finding that Ameritech violated Section 13-801. According to Z-Tel, the repeated use of the word “shall” in the statute connotes “a clear expression of legislative intent to impose a mandatory obligation.” Furthermore, Section 13-305 does

not exempt Section 13-801 from its coverage, which it could have done since the two Sections were enacted together.

Z-Tel asserts that Ameritech's notice requirement argument is an effort by Ameritech to mitigate the amount of penalties it may incur. Therefore, they are outside the scope of the rehearing and should be saved for a penalty proceeding.

Nonetheless, Z-Tel maintains that the legislative history cited by Ameritech suggests to Z-Tel that, "after hearing, the Commission could impose penalties from the date of delivery of the notice rather than the date of the Order." Z-Tel urges that the requirement in Section 13-305 – that "written notice is delivered..." – is satisfied when it filed and served its complaint, or at the least when the Commission entered its Order on February 27, 2002. In the February Order, Z-Tel notes that "the Commission provided Ameritech with notice 'of the pendency of the action' and afforded Ameritech with 'an opportunity to present their objections' that Section 13-801 was violated and that penalties were inappropriate."

Z-Tel asserts that the collection of mitigating factors offered by Ameritech are merely attempts to minimize any penalty. As such, Z-Tel opines, they are outside the scope of this rehearing, and should be properly addressed during the penalty proceeding. Also, Z-Tel disputes Ameritech's assertions that the violations of Section 13-801 are unintentional or innocent lapses.

C. Staff's Position

Staff disagrees with the arguments made by Ameritech. According to Staff, Ameritech's arguments, if accepted, would provide for no penalties for violations of Section 13-801. Such an outcome, Staff suggests, is illogical.

Staff rejects Ameritech's contention that the availability of penalties in Section 13-516 precludes those of Section 13-305, noting that Section 13-516 begins "In addition to any other provision of this Act, all of the following remedies may be applied for violations of Section 13-514." 220 ILCS 5/13-516. Therefore, Section 13-516 supplements, but does not replace or exclude, remedies available in otherwise applicable Sections. Staff is also not convinced by Ameritech's argument that Sections 13-514, 13-515, and 13-516 were enacted as 'a package deal' to replace the available penalties under Section 13-305 with those of Section 13-516.

Both Sections 13-801 and 13-514 provide certain statutory rights, under which an aggrieved party can bring a complaint. There is no requirement that a party necessarily file a complaint under one Section rather than the other. Staff avers that the interpretation advanced by Ameritech would effectively eliminate penalties available under Section 13-305 when a complainant pursues a violation of Section 13-801 as a general complaint filed under Section 10-108. Staff confirms, however, that Section 13-305 is a proper means to impose penalties for violations of Section 13-801.

Finally, Staff points to legislative history to show that the General Assembly meant to tighten, not loosen, the available remedies. In keeping with this legislative intent, penalties for violations of Section 13-801 should be available under either Section 13-305 or 13-516.

Staff avers that the notice requirement argument is beyond the scope of rehearing and therefore irrelevant to the limited question of whether the Commission may pursue penalties under Section 13-305. Staff explains that the issue may be appropriate during the penalty proceeding.

In response to Ameritech's arguments, Staff asserts that while Section 13-305 does require notice, that notice need not come directly from the Commission. Furthermore, Staff contends that the language of the statute was clear, so Ameritech's reliance on legislative history was improper. Staff also maintains that the Commission did not make any findings about the date on which any penalties began to accrue. Therefore, arguments on that topic are proper during the penalty proceeding but improper in this rehearing. Alternatively, Staff suggests that the notice needed to trigger the accrual of penalties was given either by service of process on Ameritech, or by the Emergency Order entered on February 27, 2002.

Staff maintains that Ameritech's arguments concerning mitigation are improper during the rehearing, the scope of which is limited to whether a penalty may be imposed under Section 13-305. Staff interprets Ameritech's arguments as attempts to litigate the issue before it is ripe.

Even if the timing of the arguments is proper, Staff urges that they be denied for lack of support in the record. For example, Staff disputes Ameritech's contention that it has acted in good faith where the Commission found, inter alia, that "Ameritech has unreasonably provided Z-Tel inferior and discriminatory access to operations support systems...." Order at 16.

The cases cited by Ameritech reflect the rule that penalties cannot be imposed in an arbitrary and capricious manner. According to Staff, they do not establish any principle to the effect that statutorily prescribed penalties can only be imposed for intentional violations of the statute. In any event, Sections 13-304 and 13-305 do not contain any requisite level of intent. Staff considers the proper time to consider any aggravating and mitigating factors to be the penalty proceeding itself.

IV. Commission Analysis and Conclusion

Ameritech maintains that, because penalties are provided by Section 13-516, they may not also be imposed under Section 13-305. Staff disagrees, indicating that penalties under Section 13-305 are not precluded, highlighting that Section 13-516 opens with text stating "[i]n addition to any other provision of the Act, all of the following remedies may be applied for violations of Section 13-514." 220 ILCS 5/13-516(a).

The relevant portion of Section 13-305 states the following:

A telecommunications carrier, any corporation other than a telecommunications carrier, or any person acting as a telecommunications carrier that violates or fails to comply with any provisions of this Act or that fails to obey, observe, or comply with any order, decision, rule, regulation, direction, or requirement, or any part or provision thereof, of the Commission, made or issued under authority of this Act, in a case in which a civil penalty is not otherwise provided for in this Act, but excepting Section 5-202 of the Act, shall be subject to a civil penalty imposed in the manner provided in Section 13-304 of no more than \$30,000 or 0.00825% of the carrier's gross intrastate annual telecommunications revenue, whichever is greater, for each offense unless the violator has fewer than 35,000 subscriber access lines, in which case the civil penalty may not exceed \$2,000 for each offense. 220 ILCS 5/13-305.

Ameritech argues that the application of Section 13-305 is restricted by the phrase “in a case in which a civil penalty is not otherwise provided for in this Act.” We agree with Staff, however, that the remedies in Section 13-516(a) supplement rather than substitute for the remedies in Section 13-305. Therefore, in this case, Section 13-305 is not foreclosed by the phrase cited by Ameritech. Furthermore, as Staff observes, Ameritech’s argument—that penalties from Sections 13-516 are the exclusive remedy for violations of Section 13-801—would allow Ameritech to be free from penalty for violating Section 13-801. Staff notes that such an outcome is both illogical and unjust.

Ameritech also relies on Section 13-801(k), which states in its entirety:

The Commission shall determine any matters in dispute between the incumbent local exchange carrier and the requesting carrier pursuant to Section 13-515 of this Act.

A reading of Section 13-515 shows that it establishes procedures on how a case brought pursuant to Section 13-514, or apparently Section 13-801, is handled. While Section 13-515 specifies when and how a complaint may be filed, and provides a default schedule for the case, it does not provide for penalties. Therefore, this Section does not preclude the applicability of penalty provisions under Section 13-305 for violations of Section 13-801.

In an attempt to link Section 13-801(k) to Section 13-516, Ameritech asserts that “[t]he legislature originally enacted Sections 13-514, 13-515, and 13-516 as ‘a package deal’,” and they should therefore be applied together. This argument is not persuasive. In fact, the Sections that Ameritech mentions were enacted simultaneously with Section 13-305 and 13-801. If the legislature had meant to exempt Section 13-801 from Section 13-305 penalties, or prohibit Section 13-801 complaints independent of Section 13-514,

it could have explicitly prescribed such an exclusion. Since the legislature did not do so, we find that no such exclusion should be applied.

We also reject Ameritech's contention that Section 13-516(a)(2) provides for penalties for violations of Section 13-801, within the meaning of the quoted restriction in Section 13-305. Ameritech attempts to blur Section 13-801 and Section 13-514, after having been found to have violated both Sections. The penalty in Section 13-516(a)(2) is for violations of Section 13-514 only, which we recognize includes Section 13-514(11) for violations of Section 13-801. It does not, however, reach violations brought directly under Section 13-801.

In our May 8, 2002 Order, the Commission found that Ameritech independently violated both Section 13-801 and Section 13-514. (See Order at 26.) As discussed above, the provisions cited by Ameritech do not prevent the applicability of Section 13-305 to violations of Section 13-801. Therefore, we agree with both Staff and Z-Tel that penalties under Section 13-305 are an appropriate remedy for the violation of Section 13-801, and that they may be assessed against Ameritech.

Ameritech also advances arguments as to the type of notice required and various mitigating factors in an effort to minimize or eliminate the amount of any penalty that it would owe, both of which will be deferred to the penalty proceeding.

V. Findings and Orderings Paragraphs

The Commission, having reviewed the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) Z-Tel is a Delaware corporation authorized to provide resold and facilities-based local and interexchange telecommunications services in Illinois, and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Public Utilities Act;
- (2) Illinois Bell Telephone Company d/b/a Ameritech Illinois is an Illinois corporation which is authorized to provide telecommunications services to the public in the State of Illinois, and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Public Utilities Act;
- (3) the Commission has jurisdiction over the parties and the subject matter herein;
- (4) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record herein and are hereby adopted as findings of fact and conclusions of law;
- (5) Ameritech's request for relief on rehearing should be denied;

ALJ's Proposed Order on Rehearing

- (6) Ameritech is directed to pay Z-Tel, pursuant to Section 13-516(a)(3), attorney's fees and costs resulting from this rehearing within 30 days of the issuance of this Order; and
- (7) pursuant to Section 13-515(g), Ameritech is directed to pay the Commission's costs of investigation and conduct of the proceedings herein; such costs shall be paid into the Public Utility Fund within 60 days after receiving notice of the assessments from the Commission.

IT IS THEREFORE ORDERED that the Order entered by the Commission on May 8, 2002 remains the same and in full force and effect.

IT IS FURTHER ORDERED that Ameritech is directed to pay Z-Tel, attorney's fees and costs resulting from this rehearing within 30 days of the issuance of this Order.

IT IS FURTHER ORDERED that, pursuant to Section 13-515(g), Ameritech is directed to pay the Commission's costs of investigation and conduct of the rehearing proceedings herein; such costs shall be paid into the Public Utility Fund within 60 days after receiving notice of the assessments from the Commission.

IT IS FURTHER ORDERED that any petitions, objections or motions made in this proceeding and not otherwise specifically disposed of herein are hereby disposed of in a manner consistent with the conclusions contained herein.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

Dated:
Briefs On Exceptions Due:
Reply Briefs On Exceptions Due:

October 18, 2002
October 25, 2002
October 29, 2002

Leslie Haynes,
Administrative Law Judge